

History of Tort Reform in Michigan

What is a Tort?

A tort is a civil wrong, wherein one person's conduct causes injury to the person, or property of another, in violation of a duty imposed by law. Tort law seeks to compensate victims and encourage implementation of reasonable safeguards against possible injury. A tort is distinct from a crime, in that, a crime is an offense against the public pursued by the state, and punishable by fine or imprisonment, while a tort is a private injury pursued by the injured party, who seeks a civil remedy (usually monetary compensation).

What is Tort Reform?

Tort reform involves making changes to the existing tort system to reduce what advocates see as the adverse effects of litigation. At the heart of these adverse effects are the increases in insurance costs incurred by health care providers, manufacturers, and other groups, whose activities expose them to lawsuits. In response, legislatures have passed a variety of public acts that change common law rules and rules of civil procedure, as they relate to medical malpractice, products liability, and other areas of tort law, in an attempt to protect doctors, manufacturers and others from the costs of lawsuits. Opponents of tort reform believe that such reform efforts will diminish safety incentives and put patients, consumers, and others, at greater risk of harm.

Tort Reform in Michigan

Almost every year the Michigan Legislature passes legislation that effects the state tort law system in some way. All such legislation could be considered "tort reform." Also, the implementation of and changes to the no-fault insurance laws and dram shop laws may be considered as major tort reform. Since the mid 1980s, there have been three major packages of general, non-automobile related tort reform legislation. This report addresses those three major packages.

Highlights

1986: Medical Malpractice and General Tort Reform

- 1986 PA 178 (House Bill No. 5154).

1993: Medical Malpractice Reform

- 1993 PA 78 (Senate Bill No. 270).

1995: Product Liability and General Tort Reform

- 1995 PA 249 (Senate Bill 344).
- 1995 PA 161 (House Bill 4508).

Overview of History of Tort Reform Since 1986

1986			
Public Act No. 178	House Bill No. 5154	Amended Revised Judicature Act (1961 PA 236)	Includes general changes to tort law and specific changes to medical malpractice actions, including, changes to joint and several liability, caps on damages, and requirements for mediation, among other provisions.
1989			
Public Act No. 5	House Bill No. 4010	Amended Revised Judicature Act (1961 PA 236)	Protects retirement plans from bankruptcy proceedings and other judgments. Important for medical professionals whose vulnerability to malpractice judgments could leave them exposed to the loss of their retirement funds.
1993			
Public Act No. 78	Senate Bill No. 270	Amended Revised Judicature Act (1961 PA 236)	Primarily deals with medical malpractice actions, putting caps on damages, revise regulations regarding expert witnesses, and require affidavit of merit, among other provisions.
1995			
Public Act No. 161	House Bill No. 4508	Amended Revised Judicature Act (1961 PA 236)	Makes general changes to tort law including limits on joint liability, and changes to venue requirements, among other provisions.
Public Act No. 249	Senate Bill No. 344	Amended Revised Judicature Act (1961 PA 236)	Makes changes to all tort law and specific changes to product liability actions , including, limits on scope of liability for product liability suits, provides that manufacturer or seller is not liable for a drug approved by federal Food and Drug Administration, limits damages for noneconomic loss, and establishes criteria for expert witnesses, among other provisions.

1986 & 1989 Legislation: Medical Malpractice and General Tort Reform

In 1986, the Michigan Legislature passed Public Act No. 178 (House Bill No. 5154), which amended the Revised Judicature Act (1961 PA 236). This legislation had a number of provisions that apply to all tort actions, and other provisions that apply only to medical malpractice actions. The following provisions apply to **all tort actions**:

- Limit the liability of a party in an action (other than product liability) involving an at-fault plaintiff based on the party's percentage of fault.
- Limit the liability of governmental agencies (except hospitals) even in cases involving a plaintiff without fault.

- Submit all actions in which it is claimed the damages exceed \$10,000 to pre-trial mediation.
- Require future damages over \$250,000 awarded by verdict to be paid in periodic payments.
- Require a court to award costs and fees in the case of a frivolous suit or defense.
- Prohibit interest on future damages before they are awarded, and index the rate of interest on judgments to U.S. treasury notes.
- Change venue requirements, so that the venue must be where cause of action arose and where defendant resides or conducts business, with certain additional exceptions.
- Modify the "collateral source rule," and allow an award of economic damages to be reduced by the amount paid by a third party (a collateral source).

The following provisions apply only to **medical malpractice actions**:

- Place a cap of \$225,000 on non-economic damages, with numerous exceptions such as death and intentional torts.
- Specify the qualifications of an expert witness in a case against a specialist, and prohibit experts from testifying on a contingency fee basis.
- Provide for the dismissal of a defendant upon an affidavit of noninvolvement.
- Require each party to provide security for costs or file an affidavit of a medical opinion that the claim or defense was meritorious.
- Require every action to be mediated by a panel of three attorneys and two health care providers.
- Amend the act's statute of limitations provisions by revising the time when a claim would accrue.

It should be noted that House Bill No. 5209 (1986 PA 173) was tie barred to House Bill No. 5154, and it amended the Insurance Code of 1956 to impose new requirements on companies writing commercial liability insurance.

It should also be noted that in 1986, other significant tort legislation was passed. Public Act No. 175 (House Bill No. 5163) was passed, which extended governmental immunity from tort liability and Public Act No. 176 (House Bill No. 4550) was passed, which limited the scope of liability for dram shops.

Though not traditionally thought of as tort reform, but important for medical professionals, is Public Act No. 5 of 1989 (House Bill No. 4010), which protects retirement plans from bankruptcy proceedings and other judgments. This legislation was important for medical professionals whose vulnerability to malpractice judgments could leave them exposed to the loss of their retirement funds.

1993 Legislation: Medical Malpractice

In 1993, the Michigan Legislature again took up **medical malpractice reform** and passed Public Act No. 78 (Senate Bill No. 270). This bill amended the Revised Judicature Act (1961 PA 236) to do the following:

- Provide for a cap of \$280,000 (or up to \$500,000) on the total amount of non-economic damages recoverable by all plaintiffs in a medical malpractice action.

- Revise regulations regarding expert witnesses in medical malpractice actions in order to set higher standards for a person to qualify as an expert witness.
- Require a 182-day notice before a medical malpractice action could be commenced and require a response to that notice within 154 days.
- Require each party to give the other access to related medical records in the party's control.
- Require all medical malpractice plaintiffs to file an affidavit of merit and require all defendants to file an affidavit of meritorious defense.
- Permit the binding arbitration of medical malpractice actions involving damages of \$75,000 or less and repeal current provisions on health care arbitration.
- Revise the statute of limitations for certain medical malpractice claims.
- Make other provisions pertaining to burden of proof, waiver of a plaintiff's physician patient privilege, and interest on judgments.

1995-96 Legislation: Product Liability and General Tort Reform

In 1995, two bills were passed that made significant changes to Michigan's tort law system. Public Act No. 161 (House Bill No. 4508) amended the Revised Judicature Act (1961 PA 236) to do the following in regard to **tort actions** seeking damages for personal injury, property damage, or wrongful death:

- Eliminate joint liability and the reallocation of uncollectible amounts, except in medical malpractice actions.
- Require the trier of fact to consider the fault of nonparties, as well as parties, in determining the percentage of total fault in an action involving fault of more than one person.
- Provide that noneconomic damages may not be awarded to a party whose percentage of fault exceeds the aggregate fault of the other persons, and that the party's economic damages must be reduced.
- Revise provisions governing venue.

The other piece of legislation, Public Act No. 249 (Senate Bill No. 344) amended the Revised Judicature Act (1961 PA 236) to do the following in regard to **product liability actions**:

- Provide that a manufacturer or seller is not liable if a practical and technically feasible alternative production practice was not available.
- Create a rebuttable presumption that a manufacturer or seller is not liable if the aspect of production that allegedly caused the injury complied with federal or state standards.
- Allow the admission in evidence, for certain purposes, of subsequent changes in theory, knowledge, technique or procedure.
- Provide that a manufacturer or seller is not liable if the harm was caused by alteration or misuse of the product that was not reasonably foreseeable; if the user was aware of , and voluntarily exposed himself to an unreasonable risk; or if the alleged harm was caused by an inherent characteristic of the product.
- Specify that a manufacturer or seller is not liable for failure to warn if the product was provided for use by a sophisticated user.
- Specify that a defendant is not liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that are a matter of common knowledge.
- Provide that a manufacturer or seller is not liable for a drug that was approved by the Food and Drug Administration.

- Remove certain defenses for a defendant who had actual knowledge of a product's defect.
- Place a cap on damages for noneconomic loss.
- Redefine "product liability action" to include injuries or death resulting from the sale of a product.

Also, Public Act No. 249 did the following in regard to **all tort actions**:

- Establish criteria for expert witnesses.
- Provide that a novel form of scientific evidence may be admitted only if it has achieved general scientific acceptance among experts in the field.
- Provide that it is an absolute defense if the person who was injured or killed had an impaired ability to function due to the influence of intoxicating alcohol or a controlled substance and was 50% or more the cause of the accident or event; and requires a reduction of damages if the percentage was under 50%.
- Provide that a defendant is jointly and severally liable for a crime involving gross negligence, or a crime involving the use of alcohol or a controlled substance that is a violation of a specific statute.
- Limit malpractice actions against certified public accountants.

The Future of Tort Reform

As the twentieth century progressed, the scope of tort liability expanded and tort law became increasingly helpful to plaintiffs. However, by the end of the twentieth century, the courts, state legislatures, and the U.S. Congress have begun to increasingly limit the scope of tort law in a way that is favorable to defendants. Legislative tort reform has focused on restricting liability by imposing caps on damages and limiting joint and several liability, among other reforms. Recent legislative initiatives at the federal and state level would indicate that the limiting of the scope of tort law will continue.

Sources of Information

The following sources of information are helpful in understanding more about tort reform in Michigan:

- 1) Bill Analyses for House Bill No. 5154 (1986 PA 178), Senate Bill No. 270 (1993 PA 78), Senate Bill No. 344 (1995 PA 249), and House Bill No. 4508 (1995 PA 161), produced by the House Legislative Analysis Section and the Senate Fiscal Agency.
- 2) Volume 78, No. 6 of the Michigan Bar Journal, June 1999, which covers Tort law in Michigan.
- 3) Safran, Karen H. *Annual Survey of Michigan Law*, Wayne Law Review, Summer 2004. (50 Wayne L. Rev. 757).
- 4) Rabaut, Martha. *Where's (Dr.) Waldo? Finding the Medical Malpractice Expert Witness Who Has Earned His Stripes*, Michigan State University Journal of Medicine & Law, Summer 2005. (9 Mich. St. U. J. Med. & L. 289).
- 5) Scherlinck, Jeanne M. *Medical Malpractice, Tort Reform, and the Separation of Powers Doctrine in Michigan*, Wayne Law Review, Winter, 1998. (44 Wayne L. Rev. 313).

*Prepared by
James T. Durian*